RECENT DECISIONS.

CARRIERS—EJECTION FROM TRAIN—FORM OF ACTION. According to the terms of a ticket the holder was required to have the return coupon stamped by the carrier's agent before beginning the return passage. The carrier failed to provide an agent for that purpose and the holder having boarded a train without having the stamp affixed was ejected. *Held*, he could recover damages for the ejection in an action in tort. *So. Ry. Co.* v. *Wood* (N. C. Nov. 1901) 39 S. E. 894.

Where a ticket is defective on its face, a conductor need not rely upon the passenger's explanation. *Poulin* v. *Canadian Pac. Ry. Co.* (1892) 52 Fed. 197; *Hufford* v. *Ry. Co.* (1884) 53 Mich. 118, *Yorton* v. *M. L. & W. Ry. Co.* (1882) 54 Wis. 234. Some authorities make a distinction where the ticket is apparently good, but is invalidated by some rule of the company which is unknown to the holder. *Murdock* v. *B. & A. Ry. Co.* (1884) 137 Mass. 293. The principal case does not fall within this exception, as the holder knew that the ticket was defective. The plaintiff's cause of action was in contract for breach of the defendant's promise to make his ticket good for a return passage. The breach occurred when the defendant failed to stamp the ticket, and the defendant never assumed the duty of carrier to the plaintiff, who was therefore merely a licensee. It would seem that the plaintiff should have failed to recover in tort.

CARRIERS—PLEADING—CONVERSION. The plaintiff's assignor on taking passage in one of the defendant's vessels placed a box of photographic negatives in the store-room in charge of the company's servants. Upon the ship's arrival, the box was demanded, but could not be found. Some time after the commencement of this action the negatives were found in another part of the vessel in a damaged condition. The plaintiff sued for conversion; the evidence left it in doubt whether the box had been misappropriated by a fellow passenger or an employee of the company, or had been merely misplaced by some one. *Held*, the plaintiff could not recover unless actual conversion was proved, as in trover at common law. *Wamsley* v. *Atlas Steamship Co.* (Nov. 1901) 168 N. Y. 533.

This case illustrates the importance of using great care in framing a complaint against a carrier for loss of goods. Here the plaintiff did not rely upon the company's liability as insurer for he sued, not on the contract, nor on the case for negligence, but for conversion, and hence, it was necessary to prove that the defendant, by some affirmative act, exercised dominion over the property. The law is well stated by SAVAGE, C. J., in *Packard* v. *Getman* (1830) 4 Wend. 613: "Trover lies not against a carrier for negligence, as for losing a box, but it does for an actual wrong (Salk. 665), nor for goods lost or stolen from a carrier or wharfinger; there must be an injurious conversion, something more than a bare omission. (5 Burr. 2825). When a carrier loses goods by accident trover does not lie, but where he is an actor, and delivers them to a third person, though by mistake, an action lies. (Peake, 49)."

CARRIERS—STATUTORY PENALTIES—SEPARATE OFFENSES. The plaintiff tendered the defendant for transportation a carload of cattle, which was refused, and the plaintiff brought suit under a statute imposing upon carriers a separate penalty for each article tendered for shipment and refused. *Held*, the defendant was liable for a separate penalty for each animal refused. *Carpenter* v. *Ry. Co.* (N. C. Nov. 1901) 39 S. E. 827.

It was contended by the defendant that the word "article" as used in the Statute meant the whole shipment, and not each head of cattle. But obviously a herd or car of cattle is not a single article. The object of the

act was to induce carriers to perform their duty, and a carrier might frequently prefer to pay the penalty and refuse a shipment, if only one fine could be recovered for the whole shipment. The word "article" has received judicial definition, but the meaning given varies, as its interpretation depends largely upon the context, and the cases therefore can give no indication as to its meaning in a particular statute. *Hopkins* v. *Westcott* (1868) 12 Fed. Cas. 495; *Wetzell* v. *Dinsmore* (1873) 54 N. Y. 496. The court intimated that if several articles were shipped in one case, only one penalty could be recovered, but it might in some cases be difficult to apply the statute, as where the shipment was a load of coal or grain.

CONSTITUTIONAL LAW — INTERSTATE COMMERCE — "WILSON ACT." A package of whiskey was shipped from one State to another, C. O. D. *Held*, the laws of the latter State, prohibiting the sale of liquor, took effect when the package reached its destination and was being held by the agent of the company until the sale should be completed. *Southern Express Co.* v. *State* (Ga. Nov. 1901) 39 S. E. 899.

The question in this case is whether the package, when received by the express agent, had "arrived" in the State within the meaning of the "Wilson Act" (26 U. S. Stat. 313, c. 728) or whether it did not "arrive" until received by the consignee. In *Rhodes* v. *Iowa* (1897) 170 U. S. 412, a majority of the court intimated that delivery to the consignee would alone constitute arrival, and that State regulation of liquors did not begin until that moment. The decision did not, however, involve that point. The opinion of the Georgia court, so far as it is based on the ground that "arrival" within the meaning of the "Wilson Act" is complete before delivery to the consignee, is believed to be more in harmony with the expressed meaning of the act. The transportation had been completed, whether or not the goods were paid for by the consignee. Clearly the sale was effected in Georgia by payment to the defendant. That such a transaction was intended to be protected by the act seems improbable.

CONSTITUTIONAL LAW—POLICE POWER—LIMITATION UPON RIGHT OF CONTRACT. A State statute required employers, who issued coupons or store orders in payment of wages, to redeem them in cash, if demanded. *Held*, the act was a valid police regulation. *Knoxville Iron Co.* v. *Harbison* (Oct. 1901) 22 Sup. Ct. 1

This decision seems to be the logical result of several previous decisions of the court. While the question does not seem to have been decided before, it is controlled by the case of *Holden* v. *Hardy* (1897) 169 U. S. 366, where a statute of Utah prohibiting the employment of miners for more than eight hands per day was declared constitutional, upon the ground that employer and employee do not stand upon an equality and the State may intervene where the interests of the community demand that one party to the contract shall be protected, even though the right of contract is thereby limited. Legislation somewhat similar to that in the above cases has been declared void by many of the State courts. See *Godcharles* v. *Wigeman* (1886) 113 Pa. 431; *Low* v. *Printing Co.* (1894) 41 Neb. 431; *Ex parte Kubach* (1890) 85 Cal. 274; *Ritchie* v. *People* (1895) 155 Ill. 98.

CONTRACTS—DAMAGES—FUTURE PROFITS. The defendant contracted to employ the plaintiff for a year "to make certain drop forgings" out of materials furnished by the defendant. The plaintiff agreed to give the full use of his shop for that time, and the prices were to be "determined from time to time by agreement." A partial scale of prices was agreed upon before time for performance. After several months of idleness the plaintiff served notice of his intention to claim damages and sought other work. *Held*, he was entitled to damages to the amount of the actual outlay plus anticipated profits, the shop's capacity being known. *Spiers* v. *Union Drop-Forge Co.* (Mass. Nov. 1901) 61 N. E. 825.

In a previous decision the court had held that there was a binding con-

tract to furnish employment for the year and not merely an option. *Spiers* v. *Union Drop-Forge Co.* (1899) 174 Mass. 175. KNOWLTON, J., who dissented in the principal case, argued very forcibly that the above decision could be given full effect by allowing damages only for the loss of time incurred in the reasonable expectation of orders for forgings, the prices of which had actually been agreed upon. A recovery in excess of this would seem to conflict with the fundamental principle that prospective profits of a contract, to be the basis of damages, must not be remote nor contingent upon indeterminate elements. Sedgwick on Damages, 8th ed. §§ 174, 613; *Masterson* v. *Mayor of Brooklyn* (1845) 7 Hill 61; *Todd* v. *Keene* (1896) 167 Mass. 157; *United States* v. *Behan* (1884) 110 U. S. 338.

CORPORATIONS—DUTY OF DIRECTORS—BREACH OF TRUST. A corporation, being in possession of certain premises as assignee of a lease, near the expiration of its term, sought to obtain a renewal, which was refused. Subsequently a director secured the lease for himself and covenanted neither to sublet nor assign it. *Held*, his action was not such a breach of trust as would entitle the corporation to interfere in any way with his enjoyment of the full benefit of the lease. *Crittenden & Cowler Co.* v. *Cowler* (Nov. 1901) 72 N. Y. Supp. 702.

This case is one of first impression. The explicit refusal of the landlord to lease to the plaintiff, coupled with the covenant he exacted from the defendant, would seem to have extinguished any expectancy of renewal the plaintiff might have had, and upon this ground the case may be distinguished from those in which a principal seeks to obtain the benefit of a contract made by an agent in violation of his duty. The defendant apparently received no benefit under the lease which the plaintiff might legally claim. The decision would seem to be sound.

CRIMINAL LAW—CONTEMPT—CONSPIRACY TO DEFEAT INJUNCTION. The court had enjoined strikers, by name and generally, from interfering with the plaintiff's printing establishment. The defendant, a stranger to the bill, came from another jurisdiction and conspired with the parties named to violate the injunction. *Held*, he was guilty of contempt. *Conkey Co.* v. *Russell; In re Bessette* (Ind. Oct. 1901) 111 Fed. 417.

There is no doubt that the parties here were guilty of criminal conspiracy. U. S. Rev. Stat. §§ 5399, 5440; *Pettibone* v. *U. S.* (1892) 148 U. S. 197. But this does not exclude question as to the legality of contempt proceedings. 2 Bishop, Criminal Law § 241. Irrespective of that point, the action of the court would seem to be within the statute authorizing federal courts to punish by contempt proceedings "the disobedience or resistance by any party * * * or other person, to any lawful writ * * * decree or command of the said courts." U. S. Rev. Stat. § 725. Since an injunction can be violated only by those ordered, the gist of a conspiracy on the part of a stranger to violate an injunction is not the violation of the injunction, but the obstruction offered to the court's machinery. Wharton, Criminal Law § 1380, and cases cited. Indeed actual notice of an injunction may be all that is necessary to render a party amenable to it. *In re Lennon* (1897) 166 U. S. 548.

CRIMINAL LAW—FORMER JEOPARDY. The defendant, after having been convicted of violating a city ordinance against gambling, was indicted by the State for the same act. *Held*, the former conviction would not sustain a plea of former jeopardy. *State* v. *Muir* (Mo. Nov. 1901) 65 S. W. 285.

The early decisions of Missouri and of some jurisdictions to-day are opposed to this decision. *State* v. *Cowan* (1860) 29 Mo. 330; *Lynch* v. *Com.* (Ky. 1896) 35 S. W. 264. The preponderance of authority is in favor of the principal case. Cooley, Constitutional Limitations, 239 and note; 1 Wharton, Criminal Law § 1029; *State* v. *Gustin* (1899) 152 Mo. 108; *State* v. *Clifford* (1893) 45 La. Ann. 980; *State* v. *Lee* (1882) 29 Minn. 445; *State* v. *Reid* (1894) 115 N. C. 741. Frequently municipal charters provide that prosecution in city courts shall bar indictment by the State for

the same offense. Ala. Acts 1888-89, pp. 513, 526. Where such is not the case, however, it does not seem that a plea of double jeopardy should be effective. Municipal by-laws are merely local police regulations and breach of them does not in itself involve that offense against the peace of the State which is of the essence of every crime. *Mayor of Mobile* v. *Allaire* (1848) 14 Ala. 400.

CRIMINAL LAW—FORMER JEOPARDY. The prisoner was convicted of murder in the second degree on indictment for murder in the first degree. The conviction was set aside for error of law and new trial granted. He was again convicted of murder in the second degree, although charged with murder in the first degree. *Held*, this did not constitute double jeopardy. *State* v. *Goddard* (Mo. 1901) 62 S. W. 697.

Under the Missouri Constitution of 1820 (art. 13, sec. 10), which provided that "no person, having once been acquitted by a jury, can, for the same offence, be again put in jeopardy of life and limb," the court held, in *State* v. *Ross* (1859) 29 Mo. 32, that one indicted for murder in the first degree and put upon his trial and convicted in the second degree, a new trial having been granted upon his application, could not be put upon trial again for murder in the first degree. But the Constitution of Missouri (1875) added to the provision quoted from the Constitution of 1820: "if judgment on a verdict of guilty be reversed for error in law, nothing herein contained shall prevent a new trial of the prisoner on a proper indictment or according to correct principles of law." Art. 11, sec. 23. The new Missouri rule is exceptional. The States may, however, make their own constitutional provisions on this point. The Fifth Amendment to the Constitution of the United States, prohibiting double jeopardy, applies only to the United States. *United States* v. *Keen* (1839) 1 McLean, 429, 438. A few States have adopted the principle of the later Missouri Constitution, notwithstanding the absence of such provision in their own constitutions. *State* v. *Belhimer* (1870) 20 Ohio St. 572.

EQUITY—JURISDICTION OVER PUBLIC OFFICERS. The Secretary of State threatened to remove from the State the original certificate of incorporation, filed in his office by the plaintiff, his object being to allow its use in a prosecution, pending in a foreign jurisdiction, against the plaintiff's officers for perjury. *Held*, an injunction should be issued to restrain such removal. *Delaware Surety Co.* v. *Layton* (Del. Nov. 1901) 50 Atl. 378.

The court, through considerations of public policy which seem well founded, declared that this officer would be guilty of malfeasance, if he removed outside the State any records filed in his office. In view of this ruling, the court could not logically deny the injunction, for it is well settled that, where a clear official duty requiring no exercise of discretion is about to be violated by a positive official act, any one who would be injured by the act may have an injunction to prevent it, if his remedy at law is inadequate. *State Board* v. *McComb* (1875) 92 U. S. 531. The defendants' contention that the plaintiffs were precluded from obtaining the injunction by the maxim that "he who comes into equity must come with clean hands" seems irrelevant. Fraud, neither injurious to the defendant, nor connected with the immediate transaction, is not sufficient to make the maxim applicable. *Meyer* v. *Vesser* (1869) 32 Ind. 294.

EQUITY—MISTAKE OF FACT. Certain property was levied on under an execution and in the advertisement of sale a portion was omitted. The petitioner neglected to read the advertisement and, believing that the entire property had been put up, purchased it for the full amount of his judgment. *Held*, the sale should not be set aside. *Keith* v. *Brewster* (Ga. Nov. 1901) 39 S. E. 850.

It was not the duty of the sheriff to sell the whole plot levied on, but only such a part as that the sale of it would satisfy the judgment. The plaintiff therefore by his own negligence was responsible for his mistake. *Parkhurst* v. *Cory* (1856) 11 N. J. Eq. 233 is directly in point and very

similar to the principal case, which should be distinguished from a closely connected line of cases where the element of fraud is present. *Loomis* v. *Hudson* (1865) 18 Iowa 416.

EQUITY—TRUSTS—GIFT OF BANK BOOK. R changed her account in a savings bank into an account in the names of R and S, payable to either or survivor, intending thereby to provide for S after her death. She continued to draw money for her own use, but finally gave the bank book to a friend to be delivered to S after her death. *Held*, these acts constituted a declaration of trust and S was entitled to the fund. *Hoboken Bank for Savings* v. *Schwoon* (N. J. Nov. 1901) 50 Atl. 490. See NOTES, p. 110.

INSOLVENCY—MORTGAGE TO SECURE CREDITORS. By statute no mortgage executed by a corporation was valid without the consent of a majority of the preferred stockholders. A corporation in exchange for its preferred stock gave its notes, secured by mortgage upon its personalty to P in trust for its preferred stockholders and certain ordinary creditors who by statute had priority over preferred stockholders. This was accepted by the beneficiaries. Later a second mortgage subject to the first was made to P in trust for other creditors. Three hours later the corporation made a general assignment. *Held*, both mortgages were entirely void. *Reagan* v. *Nat. Bank* (Ind. Oct. 1901) 61 N. E. 575.

The decision seems sound. Conduct of a debtor, necessarily resulting in fraud, creates a presumption of fraudulent intent. *Coleman* v. *Burr* (1883) 93 N. Y. 17. By accepting the mortgage, each beneficiary agreed to uphold the fraudulent preference of preferred stockholders. Each must accept or refuse the mortgage as a whole, and those relying on it could not assail part of it. If fraudulent in part, it was fraudulent *in toto*. Perry on Trust § 597, 602 g; *In re Lewis* (1880) 81 N. Y. 421; *Caldwell* v. *Williams* (1849) 1 Ind. 405. The preferred stockholders, therefore, did not become *bona fide* creditors. The second mortgage also was correctly declared invalid, since its beneficiaries did not accept it until after the property passed into the hands of the court under the general assignment and the rights of other parties intervened. Jones on Chattel Mortgages § 104. The trustee could not accept so as to bind them, for he was appointed by the corporation without their authority, and the presumption that they themselves accepted was rebutted by the peculiar burdens imposed by the mortgage.

INSOLVENCY—PREFERENCE. According to the terms of a mortgage of personal property executed to trustees for the benefit of certain creditors, the mortgagors were to remain in possession, to carry on the business, and, after paying for any goods which might be furnished, to pay the residue of the receipts to the creditors expressly named in the mortgage. Subsequently a receiver was appointed and the property was sold. *Held*, those who, in reliance on the terms of the mortgage, had furnished goods to the mortgagors, intermediate the execution of the mortgage and the appointment of the receiver, should be preferred to those creditors expressly named. *Reynolds & Reynolds Co.* v. *Eacock* (Ind. Oct. 1901) 61 N. E. 732.

It was maintained in this case that the principle of those cases where "material men and mechanics may take advantage of the contractor's bond, although only named as a class" applied to this case. *Brown* v. *Markland* (1899) 22 Ind. App. 652. Further than showing that the class mentioned here was sufficiently definite for a court of equity as well as a court of law to recognize, those decisions do not seem to be applicable, since they involve principles of law, not of equity. If the decision be put upon the principle that as *cestuis que trustent* the claimants should have priority, there seems to be no objection to it, since the mortgage expressly gave the claimants this right.

INSURANCE—WARRANTY—LOCATION OF PROPERTY. Chattels in house A were insured, the policy to be void if the location of the property should

in any way be changed. The property was removed to house B for there days, then to house C, consent to the last removal having been given. *Held*, the intended avoidance took effect only during the existence of the forbidden hazard. *Ohio Farmers' Ins. Co.* v. *Burget* (Ohio, Oct. 1901) 61 N. E. 712. See NOTES, p. 108.

INSURANCE—WARRANTY. A policy contained a condition of voidability for transfer or sale of the property. *Held*, it was avoided by the assignment of an equity of redemption to trustees for the benefit of creditors, though the assignor remained in possession. *Ohio Farmers' Ins. Co.* v. *Waters* (Ohio, Oct. 1901) 61 N. E. 711.

A voluntary assignment for the benefit of creditors was clearly a transfer within the terms of the policy. *Dey* v. *Poughkeepsie Mutual Ins. Co.* (1859) 23 Barb. 623. By this assignment, all the mortgagor's interest was transferred, and his claim against the trustees was for any surplus. In Kentucky an assignor in possession was protected, presumably on the ground that he still had an insurable interest. *Ins. Co.* v. *Lawrence* (1863) 4 Metc. 9. While in the principal case the insurable interest was as great after assignment as before, it is clear that it was an insurable interest of a different character.

PLEADING AND PRACTICE—APPEALABLE INTEREST. A grantor of land by warranty deed was notified by a remote grantee to defend an action. Though the notice to defend was entered on the record, he was not made a party to the suit, but defended in the name of the grantee. *Held*, he had an appealable interest, and might appeal in the name of the grantee even against the latter's will. *Ladd* v. *Kuhn* (Ind. Nov. 1901) 61 N. E. 747.

The theory of the decision is that the notice of the warrantor, entered on the record, made him constructively a party to the suit, so that a judgment would bind him. That rule was laid down in *Morgan* v. *Muldoon* (1882) 82 Ind. 352. So the manufacturers of an article alleged to be an infringement of a patent, who by consent of the nominal defendants assumed the defence of a suit against the vendors of the article, were allowed to appeal without the consent of the nominal defendants and in their name. *Andrews* v. *Thum* (1894) 64 Fed. 149. The appeal must, however, be in the name of the nominal party. *Union Nat. Bank* v. *Barth* (1899) 179 Ill. 83.

PLEADING AND PRACTICE—REMOVAL OF CAUSES—STATE AS REAL PARTY. A State statute required railroad commissioners, if necessary, to bring actions against carriers and to compel them to conform to legal rates. The State was made contingently liable for the costs of such suits, and any fines collected were to go to the educational fund of the county in which the action was brought. *Held*, the State was not the real party in interest, so as to preclude removal of the cause to a federal court for diverse citizenship. *M. K. & T. Ry. Co.* v. *Hickman et al.* (Nov. 1901) 22 Sup. Ct. 18.

The jurisdiction of the Supreme Court formerly depended upon the parties named on the record. In *Osborn* v. *Bank of U. S.* (1824) 9 Wheat. 738, the court refused to look behind the record to find the real parties in interest. But this rule of the court was changed by later decisions. *In re Ayers* (1887) 123 U. S. 443; *Ferguson* v. *Ross* (1889) 38 Fed. 161. The present rule has been so repeatedly affirmed that the only question in the principal case is whether or not the State was the real party in interest. The fact that the primary benefit to be gained by a decision for the plaintiff would be lower rates shows that the State is not the real party plaintiff, the benefit being indirect. Nor can the contingent increase in the county school fund obscure the real purpose of the litigation. The assumption of possible costs is merely an incident to the form of prosecution. The State must be regarded as a purely artificial person when it enters the court. *Reagan* v. *Farmers' L. & T. Co.* (1893) 154 U. S. 362.

REAL PROPERTY—COVENANTS—CONSTRUCTION. A covenant in a lease, following a right of renewal given to the plaintiffs for such rent as they might agree upon with the lessor, read, "or in case of a failure so to agree, the said lessor shall purchase the improvements upon said land at a fair valuation to be ascertained by three referees, or if the lessor shall prefer not to purchase said improvements, the lessees shall purchase said land." The defendant sold the land and in an action upon the covenant it was alleged that the lessor failed to purchase the improvements. *Held*, the plaintiffs could recover without proving an attempt to renew the lease. *Carpenter* v. *Pocasset Mfg. Co.* (Mass. Nov. 1901) 61 N. E. 816.

According to this decision there was no condition implied in fact, and the defendants were obliged to sell the land or purchase the improvements whether the plaintiff desired a new lease or not. This is based on the fact that the use of the words "the lessor shall purchase the improvements" showed an intention, at the time the lease was made, to put improvements on the land, which the plaintiff would not be willing to give up to the defendant at the end of the term and that the plaintiff had it in his power to make a merely formal demand for a renewal, and then refuse to agree on a fair rent, thus depriving the defendant of any protection he might have in the supposed condition. But the words of the covenant seem inconsistent with this construction.

REAL PROPERTY—FIXTURES. Where a building fitted and used as a theatre was sold under an execution, it was *held*, the seats, drop curtains and stage appliances, except the scenery which was in no way attached to the building, passed to the vendee as part of the realty. *Bender* v. *King* (Mont. Sept. 1901) 111 Fed. 60.

The tendency of decisions in this country and in England is to look at the intention with which articles have been annexed to the realty, and to treat the mode of attachment as evidence of that intention rather than as an absolute test. *Oliver* v. *Lansing* (1899) 57 Neb. 352 goes so far as to hold that scenery made to fit a certain stage, though attached to the building only when in use, is a fixture. In *Ins. Co.* v. *Allison* (1901) 107 Fed. 179, seats in a theatre and mirrors fixed to the wall and forming part of a general scheme of decoration, were held to be fixtures. As the seats were necessary to the use of the building as a theatre and the mirrors and other decorations were probably meant to remain permanently, an intention to affix them to the freehold for its improvement was evident. In *D'Encourt* v. *Gregory* (1866) L. R. 3 Eq. Cas. 382, it was held that mirrors and tapestries attached to the walls of a room were part of the wall, because the fact that they formed part of a scheme of decoration showed that they were intended to improve the freehold. This case is disapproved in *Ward* v. *Taylor* [1901] 1 Ch. 523, where tapestries stretched on frames and attached to the wall were placed there not to improve the freehold, but for the purpose of their enjoyment as chattels. In these cases different results were reached upon somewhat similar facts, but the conflict is not as to the principle involved, but as to its application. In *Monti* v. *Barnes* [1901] 1 K. B. 205, it was held that certain "dog" grates, which were articles of great weight, and were substituted for grates of ordinary size by a mortgagor after he had mortgaged the property, passed to the vendee at foreclosure. The court, however, considered the relation of mortgagor and mortgagee of importance in determining the intention; and since a mortgagor usually regards himself as owner of the freehold, it could not be inferred that he intended to leave the chattels annexed to the freehold for a short time only, as would be the case with a tenant for years.

REAL PROPERTY—SUBJACENT SUPPORT—LIMITATION OF ACTIONS. Where the owner of coal under the plaintiff's land in mining the coal neglected to leave sufficient support, so that the plaintiff's land subsided, it was *held*, the cause of action arose at the time of the mining and not when the land subsided, and though the subsidence was recent, if there had been no

mining within six years the cause of action was barred, *Noonan* v. *Pardee* (Pa. Oct. 1901) 50 Atl. 255,

The decision must rest on the principle that the right is absolute to to have one's land surrounded by land sufficient to support it, and that it is not a relative right dependent upon the amount of damages done. But this is contrary to the authorities. In *Backhouse* v. *Bonomi* (1861) 9 H. L. C. 503, it was held, on similar facts, that no cause of action arose until the damage resulted. In *Colliery Co.* v. *Mitchell* (1885) 11 A. C. 127, every new subsidence was held a fresh cause of action. *Backhouse* v. *Bonomi* has been recently followed in *Rector etc.*, v. *Paterson Extension Ry. Co.* (N. J. 1901) 49 Atl. 1030, and was recognized and approved in *Houston Waterworks* v. *Kennedy* (1888) 70 Tex. 233.

STATUTES — EXEMPTION OF HOMESTEADS. A statute made homesteads subject to executions for any "debt created for the purchase price of the land." *Held*, a judgment in an action for failure to deliver hogs, where the bill of sale of the hogs was a part of the purchase price of a home stead, was a judgment for a debt within the meaning of the statute. *Harris* v. *Larsen* (Utah, Dec. 1901) 66 Pac. 782.

The exemption of homestead lands is so strikingly liberal under the above statute that creditors would seem to need encouragement. As the statute is framed, however, the effort made in that direction in the principal case can hardly be supported. In deciding that an agreement to deliver hogs under a bill of sale is a "debt," the court adopted the most comprehensive and not the most accurate definition of that word. *Kimpton* v. *Brownson* (1866) 45 Barb. 625. In any other connection it would hardly be contended that a debt can be for anything other than money. *Arlin* v. *Brown* (1862) 44 N. H. 102. The plaintiff's cause of action was for breach of contract to deliver, involving unliquidated damages, and not for debt.

STATUTES—NEW YORK CODE OF CIVIL PROCEDURE—PROBATE PRACTICE. The N. Y. Code of Civil Proc. § 2546 provides: "Unless a referee's report is passed upon and confirmed, approved, modified or rejected by a surrogate within ninety days after it has been submitted to him, it shall be deemed to have been confirmed as of course, and a decree to that effect may be entered by the party interested in the proceedings upon two days' notice." In a case where "the party interested" did not give notice to the surrogate to confirm a report until thirty days after his action, it was *held*, the surrogate's failure to act until the end of 120 days after the submission of the report to him did not render his action based upon a rejection of the report void. *In re Clark* (N. Y. Nov. 1901) 61 N. E. 769.

The majority of the court, HAIGHT, LANDON, VANN, and MARTIN, J.J., based their decision upon two grounds: first, that the above section was merely directory, in consequence of which the surrogate's disregard of it did not render his action ineffectual, especially as he acted before the respondent gave him notice; second, that "the acts, conduct, and silence of the respondent constituted a waiver of any right he may have possessed to require the entry of a decree as of course confirming the report of the referee." PARKER, C. J., O'BRIEN and BARTLETT, J.J., however, dissented on the ground that the report at the end of ninety days should "be deemed to have been confirmed as of course," by operation of law, and that the provision for "two days' notice" was inserted by the legislature merely to insure such a disposition of the matter as was "orderly and usual."

STATUTES—NEW YORK PENAL CODE. The defendant printed in his newspaper an anarchistic article entitled "Murder *vs.* Murder," written some fifty years before, and several times republished. *Held*, he was guilty of a misdemeanor under Section 675 of the Penal Code. *People* v. *Most* (Spec. Ses. Oct. 1901) 73 N. Y. Supp. 220.

The clause construed covers "any act which seriously . . . dis-

turbs or endangers the public peace or openly outrages pnblic decency." The teaching of criminal anarchy is held to come within both of these provisions, irrespective of any consequential crime having been shown. This application of the clause seems to be without precedent. Beyond doubt such a publication "endangers the public peace." That it "outrages public decency," however, is more open to question since that term is ordinarily applied to offenses against morals. *McJunkins* v. *State* (1858) 10 Ind. 140; *Ardery* v. *State* (1877) 56 Ind. 328. Irrespective of statute, such publications would seem to be within the definition of the common law crime of "sedicious libel." *Regina* v. *Lovett* (1839) 9 C & P. 462; 1 Wharton, Criminal Law § 1611, and cases cited; 1 Bishop, Criminal Law § 457.

SURETYSHIP—DISCHARGE OF THE SURETY—INDULGENCE TO THE PRINCIPAL. The defendant made to the plaintiff a promissory note secured by mortgage. He then sold his interest in the land to a third party, who contracted to pay the note. The plaintiff assented to this arrangement, and, without the knowledge or consent of the defendant, agreed to extend the time of payment of the note. *Held*, the defendant was not discharged nor released to the extent the land depreciated in value intermediate the maturity of the note and the time of foreclosure. *Denison University* v. *Manning* (Ohio, Oct. 1901) 61 N. E. 706.

The effect of this decision is to deprive the defendant of his right, upon paying the note at maturity, to receive the mortgage security as it originally existed. The plaintiff knew of this equitable right and since the defendant was entitled to equitable defenses, it would seem that to the extent that the plaintiff impaired this right he should have been held to have released the defendant. *Murray* v. *Marshall* (1884) 94 N. Y. 611. There is indeed good authority that the defendant should have been entirely discharged. *Union Co.* v. *Hanford* (1891) 143 U. S. 187. But see *contra*, *James* v. *Day* (1873) 37 Ia. 164.

SURETYSHIP—STATUTE OF FRAUDS—PROMISE OF INDEMNITY. The defendant's son was indebted to M, who demanded additional security. The plaintiff thereupon went on his bond, as surety, at the defendant's request, relying upon the latter's oral promise to indemnify him in case he should be compelled to pay the son's debt. The plaintiff, having been forced to perform, sued the defendant on the contract. *Held*, there could be no recovery, the promise being within the statute of frauds as a "special promise to answer for the debt, default, or miscarriage of another." *Hartley* v. *Sandford* (N. J. Nov. 1901) 50 Atl. 454. See NOTES, p. 104.

TAXATION—EXEMPTION OF CHARITABLE AND LITERARY INSTITUTIONS. *Held*, a mission house and a clergy house connected with a charitable institution, which was exempt from taxation, were also exempt, but a rectory connected therewith was not exempt under Laws of 1897, c. 371. *People ex rel. Society of Church of St. Mary* v. *Feitner* (N. Y. Nov. 1901) 61 N. E. 762.

While the New York legislature has not dealt liberally with this class of institutions, the construction put upon the statute seems just. Clearly the rectory was not exempt since property devoted to such purposes is covered by Gen. Tax Law of 1896, c. 908 § 4, subd. 9. The policy of other States upon this point is worth noting. In a recent case it was decided that an infirmary which was an adjunct to a medical college was not exempt as a "public, charitable institution," although the professors did much charitable work there. *Infirmary* v. *Louisville* Ky. Nov. (1901) 65 S. W. 11. In Virginia, if the real property or *the income* therefrom is devoted to the use of the institution, it is exempt. *Mary Baldwin Seminary* v. *Staunton* (Sept. 1901) 39 S. E. 596. A similar, liberal policy has been adopted in Missouri, where it was held that the residence of bishops of a church came within a statute exempting real property devoted to "purposes purely charitable." *Bishop's Residence Co.* v. *Hudson* (1887) 91 Mo. 671. In Massachusetts, however, it has been held that the statute exempting real property of such institutions "occupied by them or their

officers for the purposes for which they were incorporated" does not cover a case where the institution merely receives the income of the property. *St. James Institute* v. *City of Salem* (1891) 153 Mass. 185. In a later case it was held that houses occupied by college officers and professors, from whose stated salary the rental for the houses was deducted, were not exempt under the above statute. *Williams College* v. *Town of Williamstown* (1897) 167 Mass. 505.

TORTS—INDEPENDENT CONTRACTOR—OBSTRUCTION OF PUBLIC STREETS. A railroad company employed an independent contractor to raise the level of a highway which was to be carried across its tracks by means of an overhead bridge. Owing to a failure to guard properly or light an embankment made in the course of this work, the plaintiff was injured. *Held*, the duty of the railroad company, like that of a municipal corporation to keep the highway reasonably safe for travel, could not be shifted or avoided by letting the work to an independent contractor. *Deming* v. *Terminal Railway of Buffalo* (Dec. 1901) 169 N. Y. 1. See NOTES, p. 112.

TORTS—CONSPIRACY—INTERFERENCE WITH BUSINESS. The plaintiff, a retail coal merchant, sued to recover damages for the destruction of his business. He alleged that the defendant wholesale dealers controlled the local coal supply, and that they had formed a combination to sell only to the defendant retail dealers, for the purpose, among others, of forcing the plaintiff and other dealers out of the retail trade. *Held*, on demurrer, the plaintiff had a cause of action at common law. *Hawarden* v. *Youghiogheny & Lehigh Coal Co.* (Wis. 1901) 87 N. W. 472.

That persons may be held liable for doing in concert acts which, when done by a single individual, would give rise to no cause of action has often been disputed. But where the acts when done in concert assume a new and oppressive character the courts have often been ready to grant relief. That injury resulting from a conspiracy formed for the purpose of harming the one injured will sustain a suit for damages, in the absence of justification or excuse, seems to be well settled in this country, while in England this doctrine has recently received the approval of the House of Lords. *Quinn* v. *Leathem* [1901] A. C. 495. Fair competition furnishes lawful justification even though it be intended to destroy a rival's business, and accomplishes that result. *Mogul Steamship Co.* v. *McGregor* [1892] A. C. 25 (H. L.). It is not possible to define with accuracy what is "fair competition;" it must be a question of fact in each case. Here, however, the court seems to have taken an extreme position. The court admits that the main purpose of the defendants' agreement was to increase their business and that the purpose of forcing the plaintiff and others out of the field was subsidiary to that. The decision is based upon the recent case of *State* v. *Huegin* (Wis. 1901) 85 N. W. 1046, but there the court was unable to find any other intent than that to injure the prosecutor.

TORTS—MALICIOUS PROSECUTION—CIVIL SUITS. One of two partners maliciously and without reasonable cause brought an action for a dissolution of the partnership, charging his partner with wrongful dealing with the partnership property, and had himself appointed receiver. *Held*, he was liable in an action for malicious prosecution, because he had both interfered with the plaintiff's property and injured his good name. *Luby* v. *Bennett* (Wis. Nov. 1901) 87 N. W. 804.

Malicious prosecution of a civil suit is not ordinarily a cause of action. This rule is well settled in England. *Savill* v. *Roberts* (1698) 1 Ld. Raym. 374, 379; *Quartz Hill Gold Mining Co.* v. *Eyre* (1883) 11 Q. B. D. 674. In America the weight of authority is in favor of this view. 21 Am. Law Reg. 281, 353; *Smith* v. *Michigan Buggy Co.* (1898) 175 Ill. 619; *Cincinnati Tribune* v. *Bruck* (Ohio 1900) 56 N. E. 198. But where the civil suit affects the defendant's personal liberty, or involves scandal to his reputation, or seizure of his property, the action for malicious prosecution will lie. *Savill* v. *Roberts*, *supra*; *Gundermann* v. *Buschner* (1897) 73

Ill. App. 180. In a number of States the general rule has been departed from, and the malicious prosecution of any civil suit is a cause of action. *Pangburn* v. *Bull* (1828) 1 Wend. 345; *Whipple* v. *Fuller* (1836) 11 Conn. 582; *Eastin* v. *Bank* (1884) 66 Cal. 123; *Woods* v. *Finnell* (1878) 13 Bush, 629.

TORTS—MASTER AND SERVANT—SAFE PLACE TO WORK. Where there was a general custom, in the erection of stone-veneer buildings, for the brick-masons to construct the scaffolding for the use of the stone-masons, and through the faulty construction thereof a stone-mason was killed, it was *held*, this custom, though known to the deceased, did not relieve the employer of the duty to provide a safe place to work. *McBeath* v. *Rawle* (Ill. Oct. 1901) 61 N. E. 847.

Where the master controls the premises, he is bound to take reasonable care to provide a safe place to work. *G. C. & S. F. Ry. Co.* v. *Delaney* (Tex. 1900) 55 S. W. 538. But where the premises are not under the master's control, he is not liable. *Channon* v. *Sanford* (Conn. 1898) 40 Atl. 462. The principal case seems to be correctly decided.

TORTS—NEGLIGENCE—RES IPSA LOQUITUR. The plaintiff, a servant of the defendant, was injured by the breaking of a stepladder on which he was working. The ladder had previously broken aad had been repaired. The plaintiff whose duty it was to see that the ladder was kept in good repair had satisfied himself as to its safe condition. It appeared that the ladder did not break where it broke before. *Held*, the fact that the ladder broke did not point to negligence on the defendant's part and the rule *res ipsa loquitur* was inapplicable; also, since the plaintiff had accepted the responsibility of keeping the ladder in repair, the breach of duty, if any, was his. *Drum* v. *New England Cotton Yarn Co.* (Mass. Nov. 1901) 61 N. E. 812.

The decision is clearly correct. Whether or not the rule *res ipsa loquitur* is applicable in a given case "must be considered always with reference to the special facts of the case, and the teachings of experience with regard to them." *Copithorne* v. *Hardy* (1899) 173 Mass. 400. Certainly where, as in the principal case, the fact of the accident in the light of common experience is as consistent with the hypothesis of due care on the defendant's part, as with that of carelessness on the part of the plaintiff, a court cannot safely say that a jury is warranted in drawing from the unexplained fact an inference of negligence. *Kendall* v. *City of Boston* (1875) 118 Mass. 234; *Millie* v. *Manhattan Ry. Co.* (N. Y. 1893), 5 Misc. 301. *See Graham* v. *Badger* (1895) 164 Mass. 42, where the nature of the accident fairly gave rise to the presumption of negligence, and 1 COLUMBIA LAW REVIEW, 398.

TORTS—NEGLIGENCE—PRIVITY OF CONTRACT. Where a railway carrier transferred a car of its own to a connecting carrier for use upon its line, and a servant of the latter was injured by reason of a defective brake, it was *held*, the first carrier owed the servants of the other the duty of exercising due care in inspecting and putting the car in a reasonably safe condition for the proposed use, and the negligence of the second carrier in failing to inspect and repair the car could not relieve the former from liability. *Teal* v. *American Mining Co. et al.* (Minn. Nov. 1901) 87 N. W. 837. See NOTES, p. 105.